A **RAJA ABDULLAH WAHMAN RAJA SULAIMAN**

v.

NIKSENG PLANTATION SDN BHD & ORS

B HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[SUIT NO: D2-22-277-1996]
3 OCTOBER 2006

C ***CONTRACT:*** *Guarantee - Indemnification - Guarantor seeking contribution or indemnity against co-guarantor before settling debts due to lender - Guarantor cannot seek contribution to himself until he has paid the lender - Guarantor can however seek order that co-guarantors pay their respective shares directly to lender*

D ***CONTRACT:*** *Guarantee - Guarantor - Bankruptcy of co-guarantor - Whether remaining guarantors liable for bankrupt co-guarantor's share*

CIVIL PROCEDURE: *Summary Judgment - Guarantee - Guarantor seeking contribution or indemnity against co-guarantor before settling debts due to lender - Guarantor seeking order that co-guarantors pay their respective shares directly to lender - Whether any triable issue - No question of law arising*

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The plaintiff and the second defendants were guarantors for loans granted by the fourth defendant bank ("the bank") to the first defendant company ("the company"). The bank subsequently filed suit D3-22-
F 2177-89, claiming against the second and third defendants repayment of the loans owing by the company to the bank as at 31 May 1989. A consent judgment was entered against the second defendant in that suit for RM275,000. The bank also filed suit Dl-22-211-91 against the plaintiff, in which summary judgment was given on 24 February 1992
G for payment by the plaintiff of RM1,000,000 and RM500,000 in respect of the fixed loan and the overdraft respectively as at 30 November 1990. On 19 April 1996 the plaintiff filed the writ in this action, seeking a declaration that he was entitled to contribution from the second and third defendants, each of one-third of the amount for which the plaintiff
H was liable to the bank under the judgment against him, and an order that they each pay to the bank one-third of the amount. Because it had come to his knowledge that the third defendant was a bankrupt, on 21 August 1996 the plaintiff applied to amend the statement of claim in this action so that the liability of the second defendant in the prayers be increased from one-third to a half. The result of the amendment would
I be that each of them would have to pay the bank RM553,681.50. The

plaintiff commenced his action before he had paid the bank, but after his liability as guarantor had been established and he had been ordered to pay to the bank the company's debts. The plaintiff applied for summary judgment.

Held (judgment given against the second defendant):

(1) A guarantor has no right to demand contribution from another co-guarantor until he has made payment to the creditor where the contribution that is sought by the guarantor is contribution to himself. However, the plaintiff did not seek contribution to himself from the other guarantors. He sought an order that the other guarantors pay to the bank the share of the company's debt that they were liable for as guarantors. That could be done. (paras 24 & 25)

(2) There was no change in or addition to the cause of action after the issue of the writ and statement of claim. The cause of action was always the same, that is, one based on the liability of co-sureties, under s. 99 of the Contracts Act 1950. The amendment was merely to suit the claim to subsequent developments. Order 18 r. 9 allows a party to "plead any matter which has arisen at any time, whether before or since the issue of the writ". (para 29)

(3) There was no triable issue. There was no question of law that had to be examined in a trial. (para 39)

Case(s) referred to:
Simtech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd [1992] 1 CLJ 509; [1992] 3 CLJ (Rep) 585 HC ***(refd)***
Wolmershausen v. Gullick [1891-4] All ER Rep 740 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 99

Other source(s) referred to:
O'Donovan and Phillips, *The Modern Contract of Guarantee,* 1985, p 489

For the plaintiff - Joginder Singh; M/s Joginder Singh & Co
For the 1st defendant - Amarjeet Singh; M/s Zubeda & Amarjeet
For the 2nd defendant - Teh Boon Eng; M/s Teh & Assoc

Reported by Amutha Suppayah

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JUDGMENT

Abdul Aziz Mohamad J:

[1] The plaintiff and the second defendant were guarantors for loans granted by the fourth defendant bank ("the bank") to the first defendant company ("the company"). This is an application for summary judgment on the plaintiff's claim for contribution from the second defendant of a sum allegedly paid by the plaintiff to the bank in excess of his share of the principal debt as between himself and the second defendant. The loans were a fixed loan of RM1,000,000 and an overdraft of RM500,000 and were approved on 26 March 1983. Originally there were three guarantors, the third defendant being the other one, and they signed the guarantees on 28 June 1983. They were the directors of the company. Four lands of the company were charged to the bank as another form of security.

[2] On 27 February 1987, which was about four years later, the second defendant gave to the bank notice that he intended to resign as a director of the company and that from 14 March 1987 he would no longer guarantee loans given by the bank to the company.

[3] On 10 April 1989, by OS S7-24-746-89 ("the charge action"), the bank applied against the company for orders for sale of two of the charged lands, which I shall refer to simply as Lots 26 and 46.

[4] On 1 June 1989 the bank's solicitors issued demands on the three guarantors for payment of the loans. As at 31 May 1989, the amounts stated to be outstanding were RM1,130,074.56 for the fixed loan and RM497,680.86 for the overdraft.

[5] On 11 October 1989 the bank filed suit D3-22-2177-89 ("suit 2177"), claiming against the second and third defendants payment of RM1,000,000 (fixed loan) and RM427,680.86 (overdraf) said to be owing by the company to the bank as at 31 May 1989.

[6] On 8 January 1990, in the charge action, Lots 26 and 46 were ordered to be sold to satisfy fixed loan and overdraft debts of respectively RM1,197,175.84 and RM531,958.33 as at 8 January 1990 and interest after that date. The order was made without opposition by the company.

[7] On 12 February 1991 the bank filed suit D1-22-211-91 ("suit 211") against the plaintiff, in which summary judgment was given on 24 February 1992 for payment by the plaintiff of RM1,000,000 and RM500,000 in respect of the fixed loan and the overdraft respectively as at 30 November 1990 with interest thereon from 1 January 1991.

The plaintiff appealed to the Supreme Court.

[8] On 21 September 1992 the third defendant became a bankrupt.

[9] On 25 September 1992 Lot 26 was sold for RM132,410 pursuant to the order for sale of 8 January 1990.

[10] On 11 December 1995 the Supreme Court dismissed the plaintiff's appeal against the summary judgment against him in suit 211.

[11] On 19 April 1996 the plaintiff filed the writ in this action, seeking a declaration that he was entitled to contribution from the second and third defendants, each of one-third of the amount for which the plaintiff was liable to the bank under the judgment against him, and an order that they each pay to the bank one-third of the amount.

[12] On 13 May 1996 the second defendant reached a settlement with the bank of the bank's claim against him in suit 2177. He was to pay RM275,000 in three instalments. He paid the first instalment of RM27,500 on that day itself. The last instalment was to be paid by 15 May 1997.

[13] On 13 June 1996 a bankruptcy notice was issued against the plaintiff at the instance of the bank, demanding payment of an amount of RM2,792,956.01 due under the judgment as at that date. That was the total in respect of both loans. A detailed statement showing how the sum was arrived at was appended to the bankruptcy notice.

[14] There is no evidence on what date Lot 46 was sold pursuant to the order for sale of 8 January 1990, although there is evidence that 13 March 1996 had once been fixed for the auction, but according to para. 12 of the plaintiff's affidavit dated 14 March 1998 (Malay version), on 31 July 1996 he was informed by an officer of the bank that Lot 46 had been sold to a nominee of the second defendant for RM1,950,000, which was RM800,000 in excess of the reserve price of RM1,150,000, and that the outstanding debt payable by he company to the bank was about RM800,000, and that he was required to pay that sum. The plaintiff followed this up with a letter to the bank dated 2 August 1996 in which, among other things, he confirmed that he would pay RM800,000 within six months. The bank replied on 7 August 1996 agreeing to accept RM800,000 as settlement to discharge the plaintiff's liability as guarantor. The plaintiff was required to pay that sum, plus interest of RM32,263 (total RM832,263), in three instalments by postdated cheques, the final instalment being on 29 January 1997.

[15] On 14 August 1996 a consent judgment was entered against the second defendant in suit 2177 for RM275,000 in terms of the settlement reached on 13 May 1996. On that date too the second defendant paid, in time, the second instalment of RM110,000.

[16] Because it had come to his knowledge that the third defendant was a bankrupt, on 21 August 1996 the plaintiff applied to amend the statement of claim in this action so that the liability of the second defendant in the prayers be increased from one-third to a half. The amendment was allowed on 16 September 1996.

[17] On 26 August 1996 the plaintiff sent to the bank three postdated cheques to settle the sum of RM832,263.

[18] On 30 August 1996 the plaintiff discontinued this action as against the bank.

[19] On 5 March 1997 the second defendant paid, in time, his final instalment, thus satisfying the consent judgment against him of 14 August 1996. The amount of the last instalment was RM151,713.99, so that the second defendant paid in all RM289,213.99, but it is the amount of RM275,000 that has been mentioned in the affidavits and the submissions as having to be taken into account. See, for example, paras. 13 and 14 of the second defendant's affidavit dated 24 March 1998.

[20] On 7 April 1997, claiming, on the strength of his letter dated 26 August 1996 forwarding the three postdated cheques to the bank, that he had paid the bank RM832,263, whereas only RM400,000 had so far been acknowledged as paid, the plaintiff applied for amendment of the statement of claim. Whereas, as it stood, the prayer in the statement of claim was (not to mention the declaration) for an order that the second defendant pay the bank half of the amount of the judgment that the bank had obtained against the plaintiff, by the amendment sought the prayer was to become one for an order that the second defendant pay the plaintiff half of RM832,263. The amendment was allowed on 15 May 1997.

[21] It was on 13 August 1997 that the plaintiff's final instalment was settled. Because the final instalment should have been paid by 29 January 1997, the plaintiff paid additional interest of RM27,263.03, so that the total amount that he paid was RM859,526.03.

[22] As the last amendment of the statement of claim on 15 May 1997 did not take into account the second defendant's payment of RM275,000, on 8 July 1998 the plaintiff once again applied for amendment of the statement of claim. For the amendment, the plaintiff

kept to RM832,263 as his payment, and not RM859,526.03, I suppose because the plaintiff felt that he ought not to bring the difference of RM27,263.03 into account against the second defendant because that was extra interest incurred by him due to his own fault in completing his payment later than the date allowed by the bank. The amendment sought was on the basis that the second defendant and the plaintiff incurred as guarantors respectively RM257,000 and RM832,263 to settle the bank's claim against the company, with the plaintiff paying RM557,263 more than the second defendant. With the amendment, the prayer sought became one for an order that the second defendant pay to the plaintiff half of RM557,263 instead of half of RM832,263. The amendment was allowed on 22 July 1998. Half of RM557,263 is RM278,631.50 and that is the amount of the judgment that the plaintiff prays for in his written submission. The result of the second defendant paying the plaintiff that amount would be that each of them would have paid the bank RM553,681.50.

[23] In his written submission the second defendant's counsel says that this application for summary judgment ought to be dismissed because there are several issues of law that require mature consideration and the plaintiff's claim is not so clear as to merit summary disposal. I think that the matters dealt with in the written submission can be reduced to four main issues.

Claim For Contribution Before Payment

[24] The plaintiff commenced his action before he had paid the bank, but after his liability as guarantor had been established and he had been ordered to pay to the bank the company's debts. The second defendant's counsel submits that in law a guarantor has no right to demand contribution from another co-guarantor until he has made payment to the creditor. That, I agree, is the correct position in law where the contribution that is sought by the guarantor is contribution to himself.

[25] However, when the plaintiff commenced his action, he did not seek contribution to himself from the other guarantors. He sought an order that the other guarantors pay to the bank the share of the company's debt that they were liable for as guarantors. That could be done, according to Wright J in *Wolmershausen v. Gullick* [1891-4] All ER Rep 740.

[26] In that case the surety had died, and his estate was being administered by the court when the lender bank put in a claim for the amount of the guarantee, and a sizeable sum was allowed. The surety's executrix, who had resisted the claim, was called upon to pay the sum. Without having paid anything, the executrix brought an action against

two co-sureties for contribution, one of whom was later dismissed from the action because he was a bankrupt. The plaintiff executrix's stand was that if she had to pay the whole sum before contribution from the remaining cosurety, "the business in which the [surety's] assets are invested will be embarrassed by the withdrawal of so much of the capital even for a short time". Wright J, after considering a string of authorities, said at pp. 747 and 748:

> In this state of the authorities I think that, if the plaintiff had made the creditors defendants to the present action, I ought to have held that the allowance of the principal creditors' claim in the administration action was equivalent to a judgment against the plaintiff for the whole amount of the guarantee, and that on the precedent of *Morgan v. Seymour* [(1638) 1 Rep. Ch. 120] and of *Dering v. Earl of Winchelsea* [(1787) 1 Cox, Eq. Cas. 318] the plaintiff would have been entitled to a declaration of her right to contribution, and to an order upon the solvent co-surety to pay his proportion to the principal creditors.

But as the bank was not a party, payment to them could not be ordered.

[27] In this case the bank was a party when the action was filed, and the declaration and order originally sought were of the kind that Wright J said the plaintiff in that case would have been entitled to had the bank been a party.

[28] What remains is the question whether the plaintiff, on the basis that he had subsequently made payment, could validly have had the statement of claim amended, as was done on 15 May 1997. The second defendant's counsel said that he could not, and relied on *Simtech (M) Sdn Bhd v. Yeoh Cheng Liam Construction Sdn Bhd* [1992] 1 CLJ 509; [1992] 3 CLJ (Rep) 585. That was a claim for payment by a sub-contractor for certain works. After issuing the writ and statement of claim, the plaintiff amended the statement of claim to increase the amount claimed, the increase being based on the final adjusted contract sum stated in the consulting engineer's statement of final account. On the plaintiff's application for summary judgment, Lim Beng Choon J held that as the additional sum became payable only after the issue of the writ, the cause of action in respect of the additional sum accrued only after the issue of the writ and statement of claim, and therefore, applying the principle of "relating bank", the plaintiff was not entitled to claim the additional sum in the action.

[29] In the present case, however, there was no change in or addition to the cause of action after the issue of the writ and statement of claim. The cause of action was always the same, that is, one based on the

liability of co-sureties, under s. 99 of the Contracts Act 1950, "as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor". The amendment of 15 May 1997, as was the last amendment of 22 July 1998, was merely to suit the claim to subsequent developments. Order 18 r. 9 allows a party to "plead any matter which has arisen at any time, whether before or since the issue of the writ".

Second Defendant Ceasing To Be Guarantor On 14 March 1987

[30] Since the second defendant ceased to be a guarantor on 14 March 1987, he would not be liable under the guarantee for any sum lent by the bank to the company after that date.

[31] In para. 15 of his statement of defence in suit 2177 the second defendant averred that after 14 March 1987 the bank and the company carried out transactions, including the release of RM1.4 million by the bank to the company. Relying on that paragraph, the second defendant's counsel argues that the plaintiff's payment of RM832,263 was in respect of debts incurred by the company after 14 March 1987, for which the second defendant was not liable.

[32] The general averment as to "transactions" after 14 March 1987 does not deserve consideration because it is not particularized, nor made in an affidavit. As to the RM1.4 million, the plaintiff explained this in para. 7 of his affidavit dated 8 April 1998. According to the plaintiff, there were certain arrangements made between the second defendant and the bank and that pending those arrangements the plaintiff was to pay the bank RM800,000 and the second defendant was to pay the bank RM1.4 million. But after the RM2.2 million was paid, the arrangement fell through and the bank, on 12 January 1988, returned the second defendant's RM1.4 million, but retained the plaintiff's RM800,000. So the RM1.4 million was not further lending to the company after 14 March 1987 but a repayment to the company or the second defendant. The explanation was not countered by the second defendant. I find that there was no further loan to the company after 14 March 1987.

Improvident Bargain

[33] The second defendant's counsel cites the following passage from *The Modern Contract of Guarantee* by O'Donovan and Phillips (1985), at p. 489:

> Where the principal debt is compromised by an agreement between the creditor and the plaintiff, the latter will be unable to claim contribution in respect of a payment under the limit of his guarantee unless the payment was accepted by the creditor in full satisfaction of

> the debt. Co-guarantors should be informed of a proposed compromise to give them the opportunity to show that it would be an improvident bargain. If they are not so advised they might be able to defend a subsequent action for contribution on the grounds that the creditor's claim could have been resisted or that settlement could have been reached on better terms. There is no such defence, however, where the co-sureties decline an opportunity to participate in the arrangement.

[34] Relying on that passage, counsel submits that for the plaintiff to be able to claim contribution, the bank must have accepted the plaintiff's payment in full satisfaction of the company's debt, whereas the payment was in discharge of the plaintiff's liability only, and that the plaintiff should have consulted the second defendant about the proposed settlement - which the plaintiff did not do - so that the second defendant would have had an opportunity to say that it was an improvident bargain.

[35] This submission cannot stand because the passage cited is about compromising the principal debt. There was no compromise of the principal debt between the plaintiff and the bank. The bank had obtained judgment under the guarantee against the plaintiff for the full amount of the company's debt then outstanding. The plaintiff lost in his appeal to the Supreme Court. The bank issued a bankruptcy notice to the plaintiff and later informed him that the amount of the company's debt that was outstanding was about RM800,000 and asked him to pay that sum.

Negligent Overpayment

[36] With the payment by the plaintiff of his final instalment on 13 August 1997, the bank would have received in all RM3,189,673 from the sale of Lots 26 and 46 (RM132,410 and RM1,950,000), from the second defendant (RM275,000) and from the plaintiff (RM832,263). The judgment the bank obtained against the plaintiff on 24 February 1992 was for RM1,500,000 with interest and costs. With those facts in the back-ground, the second defendant's counsel says in para. 4.2.8 of his written submission:

> It is inconceivable that interests and costs on the Judgment dated 24 February 1992 was in excess of RM1.7 million so that when the Plaintiff agreed and did pay the [bank] RM800,000, he was negligent in over paying the [bank].

[37] Perhaps what counsel means is that it is inconceivable that a debt of RM1,500,000 on 24 February 1992, even with interest, would have increased to so much as RM3,189,673 as at 13 August 1997, and therefore there must have been an overpayment which the plaintiff, with

his payment of RM800,000, negligently caused or contributed to. But I do not think that such an increase is inconceivable, seeing that according to the bankruptcy notice of 13 June 1996 the debt already stood, as at that date, at RM2,792,956.01 (without counting the income from the sale of the lots).

[38] The company, who have been served by the second defendant with a notice of indemnity, have also taken part in these proceedings by presenting a written submission in which they argue why summary judgment should not be given against the second defendant. The points of argument are essentially, in the main, about the same as the second defendant's. As for the rest of the written submission, I do not find any merit in it.

[39] I find no good reason for not granting summary judgment. There is no triable issue. There is no question of law that has to be examined in a trial. I give judgment against the second defendant, with costs to be taxed, for RM278,631.50 and interest on it at 8 per cent per annum from today until payment.